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8 UNITED STATES DISTRICT COURT  
9 NORTHERN DISTRICT OF CALIFORNIA  
10

11 MICHAEL ZELANY,

12 Plaintiff,

13 vs.

14 GAVIN NEWSOM, *et al.*,

15 Defendants.  
16  
17

Case No. CV 17-7357 RS

Assigned to:

The Honorable Richard G. Seeborg

**SECOND-~~PROPOSED~~ THIRD**  
**AMENDED COMPLAINT; DEMAND FOR**  
**JURY TRIAL**

Date: August 8, 2018

Time: 1:30 p.m.

Courtroom: 3, 17th Floor

Action Filed: December 28, 2017

Trial Date: November 18, 2019  
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19

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21  
22 Plaintiff Michael Zeleny (“Plaintiff” or “Zeleny”) alleges for his ~~Second~~-Third Amended  
23 Complaint against Defendants Xavier Becerra, in his official capacity (“Becerra”), the City of  
24 Menlo Park (the “City”), and Police Chief Dave Bertini (“Bertini”~~;~~), ~~and New Enterprise~~  
25 ~~Associates (“NEA”;~~ collectively, “Defendants”), as follows.  
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1  
2           1.       This case is brought to challenge the constitutionality of California statutes  
3 restricting Plaintiff's rights to bear arms under the Second Amendment while engaging in, and as  
4 part of, entertainment events and media productions of peaceful, public speech on matters of  
5 public concern or matters of political, social, or other concerns to the community, or issues of  
6 significant importance to the public as a whole, as protected by the First Amendment. This case  
7 also challenges the application, by the City of Menlo Park (the "City"), of California statutes  
8 restricting Plaintiff's rights to bear arms under the Second Amendment while engaging in, and as  
9 part of, entertainment events and media productions of peaceful, public speech on matters of  
10 public concern or matters of political, social, or other concerns to the community, or issues of  
11 significant importance to the public as a whole, as protected by the First Amendment. Lastly,  
12 this case challenges state statutes and municipal policies that have been seized upon by the City,  
13 which has imposed unlawful, content-based prior restraints, backed by the threat of criminal  
14 prosecution, to stifle Plaintiff's Constitutionally protected speech.

15           2.       Plaintiff Michael Zeleny ("Zeleny" or "Plaintiff") has been making lawful  
16 public protests in an effort to expose grave wrongdoing by a prominent Silicon Valley executive,  
17 Min Zhu, and those individuals and entities who have willingly continued to do business with  
18 Min Zhu despite knowing about his misconduct. Min Zhu's cohorts include New Enterprise  
19 Associates, Inc. ("NEA"), present and former members of NEA's senior management, WebEx  
20 Communications, Inc. ("WebEx"), and present and former members of its senior management.  
21 The point of Zeleny's protests is to express the view that Min Zhu's wrongdoing, and the  
22 conduct of NEA and WebEx senior management in turning a blind eye to it, should disqualify  
23 them from any involvement in publicly traded companies.

24           3.       Zeleny's protests have sought to publicize allegations that Min Zhu  
25 repeatedly raped his daughter Erin Zhu when she was 14 years old. Other Silicon Valley  
26 executives and investors, including NEA, WebEx, and their senior management, became aware  
27 of Min Zhu's incestuous, pedophilic assaults, but have nevertheless continued to do business  
28 with him. Zeleny has been protesting to expose Min Zhu's despicable conduct and the

1 corruption of Min Zhu's cohorts for condoning it.

2           4. To amplify his message, Zeleny previously conducted protests at which he  
3 lawfully carried unloaded firearms. Zeleny also used simulated, non-explicit images and videos  
4 of Min Zhu's heinous conduct. In compliance with entertainment event and film and video  
5 production exemptions to recently enacted California bans on the carrying of unloaded firearms,  
6 Zeleny has created, and intends to continue creating, multimedia video and live entertainment  
7 events to disseminate his message.

8           5. The targets of Zeleny's protests have attempted to sweep Min Zhu's  
9 misdeeds and NEA's and WebEx's knowledge of them under the rug. They have enlisted the  
10 help of local law enforcement to suppress Zeleny's speech. In 2012, they responded to Zeleny's  
11 protests by having him arrested and criminally prosecuted for supposed violations of California  
12 open and/or concealed carry laws. Zeleny was acquitted after a bench trial. Since that time, at  
13 the behest of NEA, the City has circumvented and subverted its own policies to deprive Zeleny  
14 of access to the permitting process so that he can resume his protests.

15           6. Despite having failed in the earlier prosecution, the City continues to  
16 threaten further prosecution if Zeleny resumes his protests. The City asserts that Zeleny is  
17 required to have a permit from the City for his events in order to qualify for state law exemptions  
18 to the firearm carry ban. Yet, the City refuses to grant Zeleny a permit for his entertainment  
19 events, even though he is willing to comply with lawful time, place, and manner restrictions.  
20 Indeed, the City refuses even to advise Zeleny *what the requirements* are for seeking a permit.  
21 Instead, the City has made clear that it will not grant Zeleny a permit because it considers his  
22 message offensive, and that if he continues his protests, the City will prosecute him for violating  
23 California's obscenity laws and its open and/or concealed carry statutes.

24           7. Zeleny files this action to seek a declaration that the California statutes  
25 invoked against him are unconstitutional. Zeleny also seeks a declaration that the California  
26 statutes as applied against him by the City are unconstitutional. Zeleny contends that the People  
27 of the State of California and the Menlo Park Police Department have violated and threaten  
28 further violation of Zeleny's rights under the First, Second, and Fourteenth Amendments to the

1 United States Constitution and provisions of the California State Constitution. Furthermore,  
 2 Zeleny's exercise of his Constitutional rights arises in connection with a public issue or an issue  
 3 of public interest. Thus, Zeleny sues under 42 U.S.C. § 1983 for violation of his civil rights.

4 8. Zeleny challenges the facial validity of California statutes restricting the  
 5 public display of unloaded firearms, California Penal Code §§ 26400 and 26350. Plaintiff also  
 6 challenges the interpretation of California Penal Code §§ 25510, 26400, 26405, 26350, and  
 7 26375 by local authorities in the City of Menlo Park, as applied to Plaintiff under the particular  
 8 circumstances of this case, and to the City's adoption and enforcement of municipal policy as  
 9 content-based restrictions on his protected speech.

#### 10 **JURISDICTION AND VENUE**

11 9. This action arises under the United States Constitution, particularly the  
 12 First, Second, and Fourteenth Amendments, and the Civil Rights Act, 42 U.S.C. §§ 1983 and  
 13 1988.

14 10. This Court has original jurisdiction over these federal claims pursuant to  
 15 28 U.S.C. §§ 1331 and 1343.

16 11. This Court has authority to grant the requested declaratory judgment  
 17 pursuant to 28 U.S.C. §§ 2201 and 2202 and Federal Rule of Civil Procedure 57.

18 12. This Court has authority to issue the requested injunctive relief pursuant to  
 19 42 U.S.C. § 1983 and Federal Rule of Civil Procedure 65.

20 13. This Court has authority to award attorneys' fees and costs pursuant to 42  
 21 U.S.C. § 1988.

22 14. This Court has supplemental jurisdiction over state law claims pursuant to  
 23 28 U.S.C. § 1367(a), and it is authorized to award attorneys' fees and costs pursuant to Cal. Code  
 24 Civ. Proc. § 1021.5.

25 15. Each of Defendant's unlawful acts alleged herein occurred in the State of  
 26 California and within the Northern District of California.

27 16. Venue is proper in the United States District Court for the Northern  
 28 District of California pursuant to 28 U.S.C. § 1391(b) because the events giving rise to the

1 instant action occurred in Menlo Park, California.

2 **THE PARTIES**

3 17. Zeleny is a citizen and resident of Los Angeles, California. Zeleny is an  
4 internationally renowned researcher of the history and technology of firearms, and a holder of a  
5 California Certificate of Eligibility (COE), which certifies that the California Department of  
6 Justice (DOJ) has checked its records and determined that he is not prohibited from acquiring or  
7 possessing firearms at the time the firearms eligibility criminal background check was  
8 performed. A COE is a prerequisite licensing/permit requirement for all prospective licensed  
9 firearms dealers, licensed ammunition vendors, manufacturers, certified instructors, gun show  
10 promoters, explosive permit holders, and other firearm-related employment activities, including  
11 any agent or employee of a vendor who handles, sells, or delivers firearms and ammunition.  
12 Zeleny has never been convicted of a felony or misdemeanor offense.

13 18. Defendant Xavier Becerra (hereinafter “Becerra”) is the Attorney General  
14 of the State of California. Plaintiff is informed and believes, and on that basis alleges, that  
15 Becerra is a citizen and resident of the State of California.

16 19. Defendant City of Menlo Park (hereinafter “City”) is a municipal  
17 corporation duly organized and existing under the laws of the State of California and located  
18 within the Northern District of California.

19 20. Defendant Dave Bertini (hereinafter “Bertini”) is and was at all relevant  
20 times the Commander of the Menlo Park Police Department. He committed the acts complained  
21 of herein while acting in his official capacity as Police Commander. Plaintiff is informed and  
22 believes, and on that basis alleges, that Bertini is a citizen and resident of the state of California  
23 and the Northern District of California.

24 21. In all of their actions and omissions alleged below, the foregoing  
25 Defendants were acting under color of state law and are being sued in their official capacities  
26 pursuant to *Ex Parte Young*, 209 U.S. 123 (1908).

27 22. Defendant New Enterprise Associates, Inc. (hereinafter, “NEA”) is a  
28 Delaware corporation with its principal place of business in Menlo Park, California. NEA bills



1 about the horrific abuse she suffered at the hands of her father, Min Zhu.

2 29. Erin Zhu also told Zeleny about posts she had made on the Usenet  
3 newsgroup alt.sexual.abuse.recovery in 1991 and 1992. Erin Zhu's posts corroborated what she  
4 had told Zeleny. The posts can be found at: [https://groups.google.com/forum/?hl=en#](https://groups.google.com/forum/?hl=en#!search//erin$20zhu$20sexual$20abuse)  
5 [!search//erin\\$20zhu\\$20sexual\\$20abuse](https://groups.google.com/forum/?hl=en#!search//erin$20zhu$20sexual$20abuse)

6 30. Erin Zhu also testified about these events under oath in deposition. Her  
7 deposition testimony can be found at: <https://youtu.be/QgmWMGG3qgE/>.

8 31. Erin Zhu requested that Zeleny help her pursue claims against her father  
9 for childhood sexual abuse. Zeleny is informed and believes, and on that basis alleges, that Min  
10 Zhu paid Erin Zhu a substantial sum of money as part of a confidential settlement to resolve her  
11 claims in April 2000.

#### 12 **NEA's Support of Min Zhu Despite Knowledge of the Allegations of His Conduct**

13 32. NEA provided venture capital support to WebEx from its early stages,  
14 through and beyond its initial public offering in 2000.

15 33. NEA continued to do business with Min Zhu through 2005, when Zeleny  
16 began his public protests. On May 2, 2005, during a WebEx Experience conference in San  
17 Francisco, Zeleny protested against the coverup of Min Zhu's rape of his daughter. The next  
18 day, WebEx cancelled its conference. It never held another user conference.

19 34. According to Breaking News, posted on ConferencingNews.com on May  
20 3, 2005, WebEx shut down its user conference in response to Zeleny's protest outside the Westin  
21 St. Francis in San Francisco the day before. The archived posting reporting this event can be  
22 found at [https://web.archive.org/web/20050507090846/http://www.conferencingnews.com/](https://web.archive.org/web/20050507090846/http://www.conferencingnews.com/breakingnews/11)  
23 [breakingnews/11](https://web.archive.org/web/20050507090846/http://www.conferencingnews.com/breakingnews/11)

24 35. A week later, this report was corroborated by another conference attendee,  
25 who stated "that the conference was cancelled because a protestor with guns was outside the  
26 event and was consequently arrested Monday night." The archived posting of this attendee's  
27 report can be found at [http://web.archive.org/web/20070225101509/conferblog.com](http://web.archive.org/web/20070225101509/conferblog.com/public/item/91268)  
28 [/public/item/91268](http://web.archive.org/web/20070225101509/conferblog.com/public/item/91268).



1           36. On May 13, 2005, after failing to get a restraining order against future  
2 protests by Zeleny, WebEx announced Min Zhu's sudden "retirement" and his relocation to  
3 China. The archived posting of this document can be found at [https://web.archive.org/web/  
4 20051109144958/http://www.webex.com:80/pr/pr340.html](https://web.archive.org/web/20051109144958/http://www.webex.com:80/pr/pr340.html)

5           37. Zeleny is informed and believes, and on that basis alleges, that the  
6 management of WebEx encouraged Min Zhu to "retire" as a result of Zeleny's public disclosure  
7 of Min Zhu's heinous conduct.

8           38. On September 23, 2005, Private Equity Week announced the formation of  
9 Northern Light, a venture capital fund co-founded in China by Min Zhu, in partnership with  
10 Scott Sandell of NEA. In commenting on this announcement on the same day, China Venture  
11 News reported: "What's missing in the PrivateEquityOnline article or any NEA release is any  
12 mention of the previous controversy surrounding NEA's venture partner, Min Zhu, who joined  
13 NEA in 2004, after his forced resignation as WebEx President and Director." The archived  
14 posting of this report can be found at [https://web.archive.org/web/20110314194905/  
15 http://www.chinaventurenews.com/50226711/nea\\_invests\\_in\\_china\\_vc\\_firm\\_northern\\_light.php](https://web.archive.org/web/20110314194905/http://www.chinaventurenews.com/50226711/nea_invests_in_china_vc_firm_northern_light.php)

16           39. Following Min Zhu's departure from WebEx and his flight from the  
17 United States, Zeleny emailed various senior management of NEA to put them and NEA on  
18 direct, personal notice of Min Zhu's abuse of Erin Zhu.

19           40. NEA refused to disavow Min Zhu. Zeleny is informed and believes, and  
20 on that basis alleges, that NEA has continued to do business with Min Zhu, who is now  
21 ensconced in the Peoples' Republic of China. In particular, C. Richard "Dick" Kramlich, a  
22 former Chairman and Co-Founder of NEA, moved to Shanghai in January 2008 to collaborate  
23 with Min Zhu, long after Zeleny brought the facts of Min Zhu's sexual depravity to the attention  
24 of NEA. See the report published in San Francisco Business Times on June 29, 2008, at  
25 <https://www.bizjournals.com/sanfrancisco/stories/2008/06/30/focus1.html?page=all>. Zeleny is  
26 informed and believes, and on that basis alleges, that NEA has sought to suppress media reports  
27 concerning the causes and circumstances of Min Zhu's departure from WebEx and the United  
28 States.



**Zeleny's Protests Against Min Zhu and His Enablers**

41. Because of the foregoing, Zeleny believed that Min Zhu was categorically unfit to serve as an officer of a publicly traded company. Zeleny also believed that anyone who would do business with Min Zhu despite knowledge of Min Zhu's monstrous conduct was similarly unfit for any position involving the public trust.

42. Between 2005 and 2012, Zeleny conducted a series of public protests. Initially, Zeleny's protests were directed only against Min Zhu. Zeleny later broadened his protests after NEA senior management refused to acknowledge or address Erin Zhu's claims. He expanded his protests to include the officers and directors of WebEx and investors in WebEx who had knowledge of Min Zhu's conduct, yet willingly continued to do business with him, including NEA and certain of its senior management such as Scott Sandell and Dick Kramlich. Zeleny's public protests were intended to expose Min Zhu's conduct and the moral bankruptcy of Min Zhu's cohorts for condoning it.

43. The protests have taken the form of in-person demonstrations, musical performances, and multimedia posts on YouTube as well as Zeleny's Internet-based LiveJournal blog, at <http://larvatus.livejournal.com/tag/webex>.

44. Zeleny's protests were intended to be provocative. They included flyers and posters containing graphic but non-obscene images reflecting Min Zhu's conduct. They also included flyers and posters calling out specific individuals, including WebEx's Chief Executive Officer Subrah Iyar and NEA's Scott Sandell and Dick Kramlich, for being enablers of Min Zhu. To draw attention to Zeleny's message, some of Zeleny's protests involved music played on accordions, trumpets, and bagpipes, and offers of free food to sex workers, registered sex offenders, and adult industry performers.

45. Zeleny made video recordings of his demonstrations and posted them on the Internet. He created a website, [www.subrah.com](http://www.subrah.com), summarizing the contents of these protest activities. On the website, Zeleny states that executives who raped family members and their knowing enablers have no place in positions of public trust.

1           46. In a further effort to draw attention to his First Amendment protests,  
2 Zeleny eventually moved to lawfully exercising his Second Amendment rights, openly carrying  
3 and displaying unloaded weapons in compliance with state law.

4           47. Zeleny always notified public officials and peace officers in advance of his  
5 plans for demonstrations. He always complied with any peace officer's request to inspect his  
6 weapons. Zeleny complied with all time, place, or manner restrictions on his protests requested  
7 by the City authorities, even when he believed that such restrictions were unlawful.

8           48. Zeleny's exercise of his Second Amendment rights has been part and  
9 parcel of his exercise of his First Amendment right to protest against Min Zhu and Min Zhu's  
10 cohorts. By incorporating a display of unloaded weapons, Zeleny intended to dramatize his  
11 protests, attract attention to them, and amplify his message.

12 **The Attempts to Stifle Zeleny's Protests**

13           49. Min Zhu and his cohorts have persistently tried to stifle Zeleny's protests.

14           50. In 2005, WebEx unsuccessfully sued Zeleny over truthful posts he made  
15 on the Yahoo! message board pertaining to WebEx. The case was styled WebEx  
16 Communications, Inc. v. Zeleny, Santa Clara County Superior Court Case No. 104CV024062,  
17 later Los Angeles County Superior Court Case No. BC324927. WebEx was eventually made to  
18 pay over \$16,000 in attorney's fees and sanctions to Zeleny, first for filing in an improper venue,  
19 and subsequently after its complaint was stricken under California's anti-SLAPP (Strategic  
20 Lawsuit Against Public Participation) statute.

21           51. When WebEx was unsuccessful in its efforts to silence Zeleny through  
22 civil litigation, it then enlisted law enforcement to attempt to silence him on its behalf.

23           52. On May 2, 2005, Zeleny began a campaign of street protests against  
24 WebEx and Min Zhu at a WebEx user conference at the Westin St. Francis hotel in San  
25 Francisco. Zeleny also protested against Subrah Iyar, another co-founder of WebEx and its  
26 CEO, and against Scott Sandell, a venture capitalist with NEA who had funded WebEx.

53. Zeleny's protest was peaceful. He did not threaten anyone or brandish any weapons. He did not use abusive language. Zeleny stood peacefully in front of the hotel, in a business suit, holding a two-foot by three-foot board, and distributing flyers.

54. WebEx nevertheless called the San Francisco Police Department and had Zeleny arrested. Because the arrest was unlawful, later that same day, May 2, 2005, the San Francisco Police department released Zeleny without charges.

55. He resumed his protest the following morning, May 3, 2005. WebEx then abruptly canceled its user conference. Ten days later, Min Zhu resigned from WebEx and left the United States for China.

56. In October 2009 and September 2010, Zeleny conducted protests in front of NEA's headquarters in Menlo Park to protest its ongoing support of Min Zhu.

**NEA and the City Conspire to Derail Zeleny's Protests**

57. In the midst of Zeleny's protests, the City and NEA entered into an agreement to stifle, restrict, frustrate, interfere with and ultimately stop Zeleny's protests by any available means. The City explained in internal documents the desire to develop a "firm solution to ending his protests." The object of this conspiracy was to delay and ultimately shut down Zeleny's protests using, among other things, harassing police tactics, false criminal prosecution, baseless legal proceedings, and later a sham permitting process.

58. The reason for the conspiracy was NEA's, the City's, and Bertini's disagreement with the content of Zeleny's protected speech and his exercise of lawful Second Amendment rights. The object of the conspiracy was illegal. At no time has the City or NEA legitimately believed or expected that they could stop Zeleny's protected based on its content. Instead, they have used unlawful and fraudulent actions as a weapon to directly interfere with Zeleny's protests through delay, distraction, and interference in violation of his First, Second, and Fourteenth Amendment rights.

59. Zeleny is informed and believes that the City and NEA first entered into this conspiracy and reached a meeting of the minds in or about 2009 through a series of phone calls and in-person communications between representatives of NEA and the City police

1 department, including Sergeant Sharon Kaufman and Bertini. NEA representatives involved in  
 2 reaching and implementing the agreement included NEA security head David Tesmontan and his  
 3 predecessors.

4 60. On information and belief, the conspiracy has later expanded to include  
 5 other individuals and other tactics, but the general object and nature of the conspiracy has  
 6 remained the same. Among other communications, Zeleny is informed and believes that the  
 7 City and NEA developed and fostered the conspiracy through numerous meetings and phone  
 8 calls, corresponding to Zeleny's protests, including in October 2009, September 2010, October  
 9 2010, April 2011, October 2011, February 2012, June 2012, March 2013, April 2013, and  
 10 September 2015. In addition, NEA and the City have routinely emailed one another regarding  
 11 Zeleny throughout the period of his protests.

12 61. The conspiracy between the City and NEA has continued to date. The City  
 13 and NEA have remained in regular contact since forming the conspiracy to develop ways, both  
 14 explicit and tacit, to perpetually stifle, delay, frustrate, and interfere with Zeleny's protected  
 15 activity. According to the City, it remained in "close contact with security from NEA" to  
 16 address Zeleny and has "worked collaboratively" with NEA to address Zeleny's protests.

17 62. Each of NEA and the City have taken overt acts in furtherance of the  
 18 conspiracy, including, without limitation, those alleged below.

#### 19 **Baseless Legal Proceedings Against Zeleny**

20 63. NEA and its executives and affiliates have filed a series of baseless legal  
 21 proceedings against Zeleny pursuant to the conspiracy. The campaign by NEA and its affiliates  
 22 began with the WebEx lawsuit in 2004. On information and belief, each of these lawsuits was  
 23 brought with NEA's assistance and encouragement, pursuant to a policy of starting litigation  
 24 against Zeleny without regard to its merit, solely for the purpose of interfering directly with his  
 25 protests by seeking frivolous emergency relief, intimidating Zeleny, and sapping his resources.

26 64. In 2004, NEA affiliate WebEx frivolously sued Zeleny for defamation in  
 27 the case styled *WebEx Communications, Inc. v. Michael Zeleny*, Santa Clara Superior Court,  
 28 Case No. 1-04-CV 024062. On information and belief, NEA encouraged and assisted WebEx in

1 this suit. The lawsuit was objectively baseless and was filed for the sole purpose of using  
2 litigation to temporarily stifle Zeleny's speech.

3 65. WebEx also engaged in other bad faith conduct to protract the litigation  
4 and disadvantage Zeleny, using the litigation to sap his resources and interfere with his protests.  
5 It filed suit in the wrong venue in clear violation of California law. WebEx was made to pay  
6 \$4,316.30 in sanctions for frivolously suing in the wrong venue.

7 66. The trial court then struck the majority of WebEx's complaint under the  
8 California Anti-SLAPP statute, Cal. Civ. Proc. Code § 425.16, finding that had no likelihood of  
9 success on the merits. As a result, WebEx was made to pay another \$12,000.00 in sanctions to  
10 Zeleny for filing frivolous claims in an effort to stifle his First Amendment rights.

11 67. WebEx dropped the remainder of its case in exchange for a waiver of  
12 malicious prosecution claims and Zeleny's agreement not to file an Anti-SLAPP motion in other  
13 contemplated litigation.

14 68. Zeleny is informed and believes that in 2009, with the encouragement and  
15 assistance of NEA and the City, NEA executive Scott Sandell filed a frivolous application in the  
16 San Mateo Superior Court for a temporary restraining order against Zeleny. This application  
17 was based on Zeleny's protests.

18 69. This application was objectively baseless and known by NEA, Sandell, and  
19 the City to be baseless. Zeleny had not engaged in any conduct offering a basis for a restraining  
20 order under California law. The TRO application was also untenable under established law as  
21 violative of Zeleny's First Amendment rights.

22 70. On information and belief, the TRO application was filed to directly  
23 interfere with Zeleny's protests despite knowledge of NEA and Sandell they could not prevail on  
24 the merits and that the TRO would be dissolved at a merits hearing.<sup>1</sup> NEA and Sandell

25 \_\_\_\_\_  
26 <sup>1</sup> Under California procedures, a party may seek a temporary restraining order against "harassment" on an *ex*  
27 *parte* basis by simply filing a form. If the court grants the restraining order, it will then set a merits hearing to  
28 determine whether the order can continue in effect. In the interim, the TRO requires a forfeiture of all  
firearms owned by the person subject to the order.

1 intentionally used this baseless TRO filing in an effort to delay and interfere with Zeleny's  
2 protests. The TRO application was denied without opposition or notice to Zeleny.

3 71. On October 5, 2010, NEA again filed another baseless TRO application  
4 against Zeleny in the case styled *New Enterprise Associates v. Zeleny*, San Mateo County  
5 Superior Court Case No. CIV499465. Once again, NEA knew that the TRO application was  
6 objectively baseless and would not withstand a merits hearing. Nonetheless, NEA filed the  
7 baseless application solely to interfere with Zeleny's protests and to temporarily delay the  
8 protests.

9 72. The court summarily denied the TRO application.

10 73. During this litigation, NEA engaged in other sham litigation conduct  
11 designed to entangle Zeleny in frivolous and costly litigation to directly interfere with his  
12 protests, and to distract and intimidate him. Among other things, NEA withheld and refused to  
13 disclose evidence, necessitating repeated motions to compel for basic discovery and depositions.

14 74. In late 2011, after the lawsuit had been pending for more than a year,  
15 Zeleny was forced to settle as he could not bear the ongoing expenses of defending himself.

16 75. In early 2012, in response to resumed protests, with the City's active  
17 encouragement and assistance, NEA worked with the City to prepare an application for an  
18 Emergency Protective Order ("EPO") against Zeleny. This was apparently the City's idea, but  
19 the City required assistance from NEA to act as the complaining party.

20 76. The contemplated EPO was also objectively baseless. Under California  
21 law, an EPO is available at the request of law enforcement to protect against domestic violence,  
22 child abuse, abduction, or elder abuse. No grounds existed for the issuance of an EPO.  
23 Nonetheless, as with the sham TRO applications, an EPO requires a turn over of all firearms  
24 until the merits hearing. On information and belief, the purpose of preparing the EPO was to  
25 directly interfere with Zeleny's protests without any hope of securing merits relief.

26 77. As described in more detail below, rather than file the EPO application, the  
27 City, pursuant to its conspiracy with NEA, had Zeleny falsely prosecuted for carrying a  
28 concealed firearm.

1 **Harassing Police Conduct and Surveillance**

2 78. In internal writings, including in police reports and in internal memo of  
3 May 2012, the City confirmed that Zeleny was not in violation of any laws in connection with  
4 his protected protesting activity.

5 79. Nonetheless, NEA and the City continued to harass Zeleny pursuant to the  
6 conspiracy in order to dissuade him from protesting and to disrupt his protests. None of this  
7 conduct was intended as legitimate law-enforcement activity, designed to result in arrest or  
8 prosecution. All of it was designed to directly interfere with the protests and to dissuade Zeleny  
9 from protesting.

10 80. Pursuant to the conspiracy, NEA took it upon itself—with encouragement  
11 from the City—to engage in daily surveillance of Zeleny including in-person and online  
12 monitoring. On information and belief, this surveillance was designed, in large part, as an effort  
13 to harass and intimidate. NEA's private contractors followed Zeleny and tracked his  
14 whereabouts and online activity at all times for a period of years.

15 81. NEA, with the encouragement of the City, also retained armed security  
16 staff when Zeleny was expected. The City encouraged NEA to have armed security personnel  
17 remain on location through the duration of Zeleny's protests.

18 82. As part of the conspiracy with the City, NEA would report Zeleny to the  
19 police each time Zeleny appeared, regardless of whether Zeleny had engaged in any wrongdoing  
20 and although NEA knew that Zeleny had not committed any crimes. City police gave NEA  
21 representatives their personal cell phone numbers so that NEA could contact them to address the  
22 Zeleny situation without using official channels.

23 83. NEA had no expectation that calling the police on Zeleny would result in a  
24 lawful arrest or prosecution and well knew that he had not committed any crimes. Internal  
25 police records show that Zeleny was not engaged in any criminal activity and was extremely  
26 cooperative at all times. NEA reported Zeleny solely to trigger a response by police officers  
27 who would then harass and disrupt Zeleny's protests.



1           84. Much of NEA's reporting to the police was false or, at minimum, highly  
2 misleading. For example, despite Zeleny not being at NEA's headquarters in close to a year,  
3 NEA security reported to the City police (as well as the FBI, ATF, and the U.S. DOJ) that  
4 Zeleny was an "on-going threat to NEA and its employees." On information and belief, NEA  
5 made other false and misleading reports to law enforcement authorities, solely for the purpose of  
6 causing them to harass Zeleny and not to secure any genuine law enforcement action such as  
7 arrest or prosecution. NEA's reporting was routinely based solely on the content of Zeleny's  
8 lawful First Amendment activity.

9           85. Consistent with the conspiracy, the City engaged in extensive harassing  
10 conduct towards Zeleny in violation of its own written policies. It would uniformly respond to  
11 NEA's reports by appearing on site and harassing Zeleny and his supporters.

12           86. City police remained on scene at all times when Zeleny was present,  
13 despite repeatedly acknowledging that Zeleny was fully cooperative and had not committed any  
14 crime. While present, City police stopped and questioned Zeleny and his supports extensively  
15 without any reasonable suspicion of criminal activity.

16           87. In violation of written City policy, police questioned Zeleny and his  
17 supporters about the content of their protests and their motivations for protesting.

18           88. City police would also follow and question Zeleny's supporters extensively  
19 about their affiliations with Zeleny and their involvement in his protests. In one instance, in an  
20 effort to dissuade Zeleny's supporters, City police extensively questioned an off-duty Sheriff's  
21 Deputy attending the protests about his relationship to Zeleny and his status with the Sheriff's  
22 department where he worked. They followed and stopped other supporters merely to question  
23 them about their affiliation with Zeleny and why they were supporting him, using sham  
24 "enforcement stops" for this purpose.

25           89. Also in violation of written policy, City police followed Zeleny and his  
26 supporters in both marked and unmarked cars and using undercover officers. City police  
27 followed Zeleny even after he left the City limits and kept tabs on where he was staying.  
28

1           90. City police interfered with Zeleny's protests, requiring him to lower the  
2 volume of musical performances and to move his signage, even when this was not required by  
3 City ordinance or policy. Doing so was also a violation of the City's written policy.

4           91. The City kept extensive surveillance on Zeleny, again in violation of City  
5 policy, which prohibits City staff from keeping surveillance on protestors when there is no  
6 reasonable suspicion of a crime being committed. City police were given an express directive to  
7 issue "[d]etailed reports regarding any contact with Zeleny." In addition to generating numerous  
8 "informational" reports on Zeleny, Bertini kept his own personal "Zeleny file."

9           92. During Zeleny's protests, Bertini unilaterally deemed Zeleny as a "security  
10 risk," and used this as a basis to ignore City policy prohibiting the above conduct.

#### 11 **Frivolous Criminal Prosecution**

12           93. In July 2012, pursuant to its conspiracy with NEA, the City frivolously  
13 referred Zeleny to the County of San Mateo District Attorney's Office<sup>2</sup> for a sham prosecution  
14 for carrying a "concealed" handgun. This prosecution was also objectively baseless and a sham  
15 based on misrepresentations and the suppression of exculpatory evidence required to be  
16 disclosed to Zeleny under *Brady v. Maryland*, 373 U.S. 83 (1963). The City and NEA's aim  
17 was, again, to directly interfere with Zeleny's protests rather than to achieve a legitimate  
18 outcome through the criminal process.

19           94. The City's referral of the criminal case was fraudulent and based on the  
20 willful withholding and misrepresentation of evidence. Initially, the officers who responded to  
21 Zeleny's protests on the date in question, June 13, 2012, found no evidence of criminal activity.  
22 Nonetheless, Bertini made the decision to refer Zeleny for prosecution.

23           95. The City referred Zeleny for prosecution based on the written report of  
24 Officer Jeremy Foy. Initially, Officer Foy reported his interaction with Zeleny as informational  
25 only. Neither Officer Foy, nor any of the other officers on site, arrested Zeleny, cited him, or  
26 suggested that he was committing a crime.

27 <sup>2</sup> The District Attorney's Office is not a City agency, but an agency of San Mateo County.  
28

1           96.     Later, apparently after speaking with Sharon Kaufman and  
2 Bertini(participants in the conspiracy), Officer Foy generated a felony policy report against  
3 Zeleny, which Bertini used to make the criminal referral, and which the County used to  
4 prosecute Zeleny. In this sham report, Officer Foy asserted that he had observed Zeleny  
5 carrying a “concealed” firearm in a belt holster. According to Officer Foy, the holster was such  
6 that he could not determine whether it contained a weapon. This was the entire basis for the  
7 City’s referral for prosecution and the County of San Mateo’s prosecution.

8           97.     The City and the County District Attorney’s office concealed from  
9 Zeleny—in violation of his constitutional rights under *Brady*—and from the trial court, that in a  
10 prior report Officer Foy had documented the same firearm in the same holster and reported that  
11 he was able to immediately see that the holster contained a firearm. As a result, the firearm was  
12 not “concealed.” Officer Foy made the prior report for informational purposes, concluding that  
13 no crime had been committed. On information and belief, the City and the County intentionally  
14 concealed this clearly-exculpatory evidence to support the sham prosecution.

15           98.     The fraudulent basis for the criminal prosecution, and the wrongful  
16 withholding of evidence, was such that it deprived the entire proceeding of its legitimacy.

17           99.     The City and the County engaged in further sham conduct in connection  
18 with the criminal proceeding. Among other things, the Deputy District Attorney in charge of the  
19 case claimed at different stages of the proceeding that Zeleny had violated the law by carrying a  
20 “concealed” weapon, and through the same conduct violated the law by “openly” carrying a  
21 weapon. When Zeleny argued that he fell within an exception to the firearms statutes because he  
22 was taking part in an entertainment event or video production, the City made retroactive changes  
23 to the policies posted on its website for such events, which the County prosecutor then relied  
24 upon to argue that Zeleny needed a permit for these activities so could not fall within the  
25 exception.

26           100.    On information and belief, the City and County pursued the sham  
27 prosecution at NEA’s behest and with its active encouragement and participation. Despite  
28 having no standing to participate in the criminal proceeding, NEA inserted itself into that

1 proceeding, ultimately controlling prosecutorial decisions. In the course of the prosecution,  
2 NEA's representatives monitored Zeleny's trial, gave *ex parte* strategic input to both Bertini and  
3 the District Attorney's Office, and met frequently with Deputy District Attorney. The Deputy  
4 District Attorney regularly referred to NEA as "her client" or "the client," and indicated that she  
5 needed NEA's approval before making significant decisions.

6 101. More than two years the District Attorney filed the frivolous criminal  
7 charges, the trial court acquitted Zeleny, holding: "His weapon was properly holstered in the  
8 holster which was manufactured for that very weapon." The criminal prosecution had its  
9 intended effect, however, of stopping Zeleny's protests for two years under the threat of criminal  
10 prosecution.

11 102. While the criminal prosecution was ongoing, California enacted new  
12 restrictions on the "open carry" of firearms, described below. The City immediately seized on  
13 these new laws to stop Zeleny from protesting. California Adopts "Open Carry" Restrictions  
14 for Handguns and Non-Handgun Firearms

15 103. Prior to January 1, 2012, it was legal to openly carry an unloaded firearm  
16 in public in California. On October 10, 2011, Governor Brown signed a bill that modified the  
17 law on openly carrying an unloaded handgun to match the existing restrictions for openly  
18 carrying a loaded weapon.

19 104. California Penal Code section 26350 now prohibits the open carrying of an  
20 unloaded handgun, outside of a vehicle, in public, in an incorporated city or city and county.

21 105. Section 26375 exempts from section 26350, "the open carrying of an  
22 unloaded handgun by an authorized participant in . . . a motion picture, television or video  
23 production, or entertainment event, when the participant lawfully uses the handgun as part of  
24 that production or event."

25 106. A year later, in 2012, California adopted similar restrictions on open carry  
26 of firearms other than handguns. Penal Code section 26400, which became effective on January  
27 1, 2013, makes it a crime for a person to "carry[ ] an unloaded firearm that is not a handgun in  
28 an incorporated city or city and county when that person carries upon his or her person an

1 unloaded firearm that is not a handgun outside a vehicle while in the incorporated city or city  
2 and county.”

3 107. Section 26405(r) contains a similar exemption for “an authorized  
4 participant in, or an authorized employee or agent of a supplier of firearms for, a motion picture,  
5 television, or video production or entertainment event, when the participant lawfully uses that  
6 firearm as part of that production or event.”

7 108. Section 25510 contains a similar exemption from sanctions under Section  
8 25400 for carrying a concealed firearm for “an authorized participant in a motion picture,  
9 television, or video production, or an entertainment event, when the participant lawfully uses the  
10 firearm as part of that production or event, or while going directly to, or coming directly from,  
11 that production or event.” Zeleny’s Efforts to Engage in Protected First and Second  
12 Amendment Activity

13 109. Since the enactment of Penal Code sections 26350 and 26400, Zeleny has  
14 attempted to continue his peaceful protests as part of a video production, exercising his rights  
15 under sections 25510, 26375, and 26405 to film his protests, and then distributing the videos  
16 online.

17 110. Zeleny’s protests are part of a rich history of peaceful, but armed, protests,  
18 many drawing inspiration from the Black Panthers. Protests of this nature are common across  
19 the country in states that have not completely banned the open carry of unloaded firearms. The  
20 conspicuous bearing of loaded and unloaded arms in connection with a public or political issue  
21 is an effective form of political speech and public demonstration.

22 111. Zeleny’s protests are protected activity under both the First and Second  
23 Amendments to the United States Constitution.

24 112. The First Amendment protects non-verbal forms of communication as well  
25 as verbal speech. Zeleny’s protests, which combine pure speech, flyers, signs, posters, video,  
26 and the peaceful carrying of unloaded firearms, are constitutionally protected activity.

27 113. Zeleny is equally entitled to the benefit of sections 25510, 26375, and  
28 26405 of the Penal Code as would be a large movie studio or production company. “Liberty of

1 the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as  
 2 much as of the large metropolitan publisher who utilizes the latest photocomposition methods.”  
 3 *Branzburg v. Hayes*, 408 U.S. 665, 704 (1972). While Zeleny was not engaged in the  
 4 production of feature films intended for national and international distribution, he did create his  
 5 video content for the purpose of publishing it on the Internet, in connection with a matter of  
 6 significant public interest.

7 114. Zeleny’s right to openly carry unloaded firearms is also protected by the  
 8 Second Amendment. The right to bear arms enshrined in the Second Amendment includes the  
 9 right to “wear, bear, or carry . . . upon the person or in the clothing or in a pocket for the purpose  
 10 of being armed and ready . . . in case of conflict with another person.” *District of Columbia v.*  
 11 *Heller*, 554 U.S. 570, 584 (2008). The motivating principle of the Second Amendment is self-  
 12 defense. *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

13 115. The First and Second Amendment are made applicable to municipalities  
 14 pursuant to the Due Process Clause of the Fourteenth Amendment.

15 116. The Defendants, however, acting under color of law and in their official  
 16 capacities, have either suppressed or threatened to suppress Plaintiff’s lawful exercise of his  
 17 Constitutional rights pursuant to official policies, customs, or practices. The Defendants  
 18 interpret certain California statutes in such a way that Plaintiff’s protests are completely  
 19 foreclosed by California’s prohibition on the carriage of exposed firearms.

20 **The City Threatens Further Prosecution in an Effort to Chill Zeleny’s Protected Speech**

21 117. The City, invoking the power of the State of California, continues to  
 22 threaten Zeleny with further prosecution if he resumes his protests. The City police have  
 23 candidly confirmed that their threatened prosecution is based in part on the content of Zeleny’s  
 24 message, which they find to be offensive.

25 118. On March 15, 2013, following a meeting with NEA, the City noted that  
 26 open carry is “now illegal,” referring to the Penal Code sections discussed above, such that  
 27 Zeleny would no longer be allowed to carry guns in his protests.

1           119. In order to ensure that Zeleny cannot rely on the express exceptions to the  
2 “open carry” ban, acting at the behest of NEA, the City has developed an artificial and defective  
3 interpretation of the statutes for the sole purpose of interfering with Zeleny’s protests.  
4 According to the City, in order to fall within the exceptions, Zeleny must have City approval  
5 through an opaque permitting process, described in more detail below, in order to carry weapons  
6 as part of his protests.

7           120. Between June 2015 and the present, Zeleny has attempted to exercise his  
8 rights under sections 25510, 26375, and 26405 by engaging in videotaped protests while  
9 carrying unloaded firearms, including handguns and rifles.

10           121. Contrary to the plain language of the Penal Code, however, the City has  
11 interpreted it to require authorization from the City both for the video production itself, and for  
12 the carrying of unloaded firearms as part of that production.

13           122. Shortly after the adoption of section 26405, the City adopted a municipal  
14 policy, which purportedly requires a Special Event Permit for Zeleny’s protests.

15           123. The City informed Zeleny that if he engages in his protests without a  
16 permit under its Special Event Permit policy and/or a film permit from the City, he will be  
17 prosecuted for violation of California’s open and/or concealed carry laws, including California  
18 Penal Code §§ 25400, 26400, and 26350.

19           124. In an effort to comply with the City’s requirements, between 2015 and  
20 present, Zeleny has repeatedly applied to the City for entertainment and/or film permits  
21 accommodating his videotaped, armed protests. Despite his offers to accommodate all  
22 reasonable time, place, and manner restrictions on his proposed events, the City has denied all of  
23 Zeleny’s applications without explanation. It has expressly declined to formulate conditions for  
24 approval or to provide Zeleny with any lawful time, place, or manner restrictions that he could  
25 satisfy in order to secure permits.

26           125. Zeleny has repeatedly requested that the City identify the conditions or  
27 criteria Zeleny must satisfy to receive a permit, and the City has failed and refused to do so.  
28



1           126. During an appeal of one of Zeleny's requests for a permit, Bertini testified  
2 that the City had denied Zeleny's requests, among other reasons, because they found the content  
3 of his protests offensive and "obscene as to minors." Evidence uncovered in discovery  
4 demonstrates that the City has attempted (largely unsuccessfully) to use obscenity and similar  
5 content-based statutes to stop Zeleny's protests since at least 2010.

6           127. Plaintiff is informed and believes, and on that basis alleges, that the City  
7 has continually denied and refused to process Zeleny's requests for permits because it disagrees  
8 with the substance of his message, and does not believe that his statement about Min Zhu's  
9 conduct or WebEx's and NEA's tacit approval of that conduct are true.

10           128. The requirement that Zeleny obtain a permit, and refusal to approve  
11 Zeleny's permits or processes them in the ordinary course, is an unlawful, content-based  
12 restriction on Zeleny's speech protected by the First Amendment. Plaintiff is informed and  
13 believes, and on that basis alleges, that the content-based refusal to approve Zeleny's requests  
14 for permits was undertaken pursuant to an official policy, custom, or practice of the City.

15           129. In August 2016, Zeleny met with Menlo Park City Manager Alex McIntyre  
16 and Police Commander David Bertini in seeking a permit. At that time, Commander Bertini  
17 took issue with a piece of non-obscene artwork that Zeleny was proposing to display as part of  
18 his protests. An accurate depiction of the artwork is attached hereto as Exhibit A.

19           130. Commander Bertini threatened that if Zeleny displayed the artwork, he  
20 would be arrested for violation of California Penal Code, section 313.1(a), which prohibits the  
21 distribution of harmful content to minors. Commander Bertini also threatened Zeleny with  
22 criminal sanctions for carrying firearms in the course of his videotaped protests.

23           131. Zeleny is informed and believes, and on that basis alleges, that the  
24 foregoing conduct of the City and City officials was pursuant to an official policy, custom, or  
25 practice of the City.

26           132. Zeleny continues to exercise his right to free speech under the Constitution,  
27 in connection with this issue of public interest. Zeleny tried many different ways of  
28 accommodating the City and NEA, but their demands kept escalating unreasonably, from

1 objections to the volume and nature of unamplified musical performances, to demands to  
 2 relocate the protests outside of the Rosewood complex that houses NEA. Ultimately, what the  
 3 process revealed was content-based discrimination.

#### 4 **The City and NEA Entangle Zeleny in a Sham Permitting Process**

5 133. Evidence uncovered during discovery demonstrates that the City and  
 6 Bertini, with the assistance and encouragement of NEA, developed a strategy to apply sham  
 7 permitting procedures to Zeleny's permit applications, with the specific purpose of depriving  
 8 him of access to the ordinary administrative process. The purpose of this conduct was not to  
 9 reach a legitimate outcome on Zeleny's permit applications, but to complicate, frustrate, and  
 10 perpetually delay the process to interfere with Zeleny's ability to protest. To date, Zeleny's most  
 11 recent permit application remains in limbo and the City refuses to process it even now.

#### 12 **The Published Permitting Process**

13 134. The City publishes on its website a series of procedures governing the  
 14 process for seeking Special Events Permits within the City.

15 135. The process is designed to be an interactive process between the citizen  
 16 and the City to develop a permit application that will be approved by the City. As specified by  
 17 published City policy, the process is supposed to involve the following steps:

18 a) The City Community Services Director communicates with the  
 19 applicant to secure a permit application, and then screens the initial application for  
 20 completeness. If the application is incomplete, within 48 hours, the Community Services  
 21 Director will communicate with the applicant regarding any deficiencies.

22 b) The application is then forwarded to six internal City departments  
 23 for a collaborative review. Bertini is not ordinarily involved in this process. Within 10 days, the  
 24 internal staff review and either conditionally approve or disapprove the decision.

25 c) If internal staff need more information, the Community Services  
 26 Director sets up an in-person meeting with the applicant to address this information with the goal  
 27 of securing a complete application.

1 d) Once the information is provided, the City will then send  
 2 Conditions of Approval or Denial to the applicant. Once these items are completed, the permit  
 3 will be conditionally approved subject to public notice.

4 e) If the application is denied, it is then subject to a two-stage appeal  
 5 process, first with the City Manager, and then with the City Council. At both stages of appeal,  
 6 both the applicant and the City are allowed to present evidence and argument, and examine and  
 7 cross-examine witnesses, all in a public hearing on the record. Final denials are subject to  
 8 review in court pursuant to California Code of Civil Procedure § 1094.8.

9 136. In the ordinary course, special event permits are generally given  
 10 conditional approval within a matter of days or weeks based on a very basic description of the  
 11 date, time, and location of the event and the expected activities and setup.

12 137. The City has a separate permitting process for film permits. A different  
 13 City department handles film permits. In practice, they are issued based on a cursory  
 14 application, again with minimal information required. The City approves most film permits  
 15 within a day or a few days of a request.

16 **The City and NEA Conspire to Derail Zeleny's Permit Applications**

17 138. On or about July 10, 2015, in an effort to comply with the City's  
 18 interpretation of the firearms statutes, Zeleny submitted a Special Events Permit application. He  
 19 stated that he planned to start on October 1, 2015. Without telling Zeleny, the City (at Bertini's  
 20 direction) then circumvented the permit process entirely, and subjected Zeleny's permit to ad  
 21 hoc processes that have never applied to any application before or after.

22 139. As part of the ongoing conspiracy, Bertini took action to stymie and  
 23 deprive Zeleny of a valid process. Bertini intercepted and unilaterally processed and denied  
 24 Zeleny's application himself on content-based grounds, without ever submitting it through the  
 25 ordinary process of approval. Bertini did not allow the Community Services Director nor the  
 26 six-department group to review Zeleny's permit application.<sup>3</sup>

27 <sup>3</sup> NEA was never directly involved in the permitting process. It made no appearance at any of the hearings. It  
 28 did not submit any materials.

1           140. The City did not immediately respond to Zeleny and failed to respond to or  
2 process his application on its published timeline. Instead, according to internal City  
3 communications, Bertini set up a meeting with NEA “so we can coordinate our response.”

4           141. Bertini stayed in regular contact with NEA throughout the permitting  
5 process, including this in-person meeting, which took place on September 2, 2015, as well as  
6 phone calls and emails with David Tresmontan, NEA’s security officer. Throughout the process,  
7 Bertini previewed the City’s proposed course of action to NEA before any official decision.

8           142. Pursuant to this conspiracy, with NEA’s encouragement, Bertini developed  
9 a strategy to continually delay and frustrate Zeleny’s permit applications rather than allowing  
10 them to be resolved through the ordinary process. This conduct was designed not to achieve a  
11 legitimate outcome, but to use the process itself to stifle Zeleny’s ability to protest by drawing  
12 him into an endless, Kafkaesque process that did not follow established City policies or  
13 procedures. Neither the City nor NEA have a reasonable, good faith belief that the City can  
14 properly deny Zeleny’s permits on content-based grounds, and the City continues to  
15 acknowledge that it cannot legitimately stop Zeleny from protesting.

16           **Bertini Unilaterally Processes and Denies the Application, Depriving Zeleny**  
17           **of Access to the Ordinary Administrative Process**

18           143. Rather than submit the application through the ordinary process, Bertini, in  
19 consultation with the City Attorney, unilaterally processed Zeleny’s application himself. On  
20 information and belief, this has never before occurred in the permitting program. City staff  
21 referred to Zeleny’s permit application as “the one PD [i.e., the Police Department] handled[.]”

22           144. Bertini applied no objective criteria to the permit application.

23           145. The City never engaged in an interactive process with Zeleny. It never  
24 attempted to set up an in-person meeting as its policy requires to “complete” the application.

25           146. Instead, the denial of Zeleny’s application was preordained due to the  
26 ongoing conspiracy and efforts to stifle Zeleny’s protests.

27           147. On July 21, 2015, Bertini emailed NEA and others about Zeleny’s permit  
28 application. The City had not responded or provided feedback to Zeleny at that time. He

1 advised that the City had already decided to deny the application, but would still request more  
2 information from Zeleny before notifying him of the denial:

3       Although we intend to deny this application on several grounds (predominately  
4       that this is not a ‘special event’ as defined by the City), we are in the process of  
5       requesting more information from him on the exact location he was intending as it  
6       was not clear on his application. Once we have gone through the formal  
7       information gathering process, we will notify him of our decision on his  
8       application.

9       The same day, Bertini emailed NEA security officer David Tesmontan to ask if NEA  
10       was still conducting surveillance on Zeleny, apparently to obtain information to  
11       justify the re-determined denial of the permit.

12       148. Although Bertini was effectively processing the permit application himself,  
13       the City referred Zeleny to the “Special Events Permit Committee.” In one of its denial letters,  
14       the City stated that the decision was made by this committee. *There is no such committee and  
15       never has been.* Bertini admitted at his deposition that the City has not had a special events  
16       committee at any point since the program has been in effect.

17       **The City Frustrates Zeleny’s Application with Needless Demands for**  
18       **Information Having Already Decided to Deny the Permit.**

19       149. Consistent with this plan, although the City had already decided to deny  
20       Zeleny’s application, it continued to pepper Zeleny with requests for more information, to  
21       “complete” the application. Bertini confirmed that the City had firmly decided to deny the  
22       application, but would not notify Zeleny until “after completing the appropriate due diligence” –  
23       i.e., requesting extensive, unnecessary information.

24       150. On July 24, 2015, the City Attorney emailed Zeleny demanding extensive  
25       information supposedly needed to “process” the application. The City Attorney claimed that the  
26       City could not “further process [the] application” without this information, although Bertini had  
27       already decided to deny it. He also claimed that there was no urgency to Zeleny’s application  
28       because the event was not contemplated until late September or October.

151. The City demanded far more extensive information from Zeleny that it has  
ever required from any other applicant. The City did not need this information to complete a

1 decision. Instead, on information and belief, the City simply made these demands on Zeleny to  
 2 make the permitting process more difficult and to use the supposed lack of information, or an  
 3 information Zeleny provided, as a pretext to deny or refuse to process the application.

4 152. The City engaged in the same conduct with respect to Zeleny's later film  
 5 permit application, as discussed below.

6 **Bertini Generates Pretextual Reasons for Denying the Permit Application**

7 153. Bertini made up pretextual and circular reasons for denying the permit  
 8 application, which were unsupported by City policy, when in fact the denial was purely content  
 9 based. At each stage of the permitting process, the City has offered a changing series of  
 10 pretextual grounds for denying Zeleny's permit application to conceal content-based restrictions.

11 154. The City has no objective criteria that it applies to permit applications  
 12 either in terms of completeness or the ultimate permitting decision.

13 155. On September 21, 2015 – i.e., nine days before his protest was set to start –  
 14 the City sent Zeleny its official denial of his permit application. The City gave two primary  
 15 reasons for the initial denial of Zeleny's permit application: (1) the application being  
 16 “incomplete”; and (2) the application not meeting the criteria for a “special event.”

17 156. Both of these were pretextual. The application was not incomplete. Zeleny  
 18 had provided far more information than was required to process such an application. As  
 19 Bertini's communications make clear, no matter what information Zeleny submitted, his permit  
 20 was going to be denied.

21 157. Similarly, the City cannot specify any objective criteria for what  
 22 constitutes a “special event as defined by the City.” Instead, as Bertini has since admitted,  
 23 Zeleny's activity qualifies as a special event under at least three categories in the City's  
 24 published guidelines:

25 Q. Is the City -- is the definition in this FAQ of what qualifies as a  
 26 special event the City's definition of a special event?

27 A. Yes.

28 Q. So under this -- at least under the published FAQ, Mr. Zeleny's event  
 would qualify as a special event on at least three criteria; correct?

A. Yes.

158. After the initial denial, the City gave a series of shifting reasons for the denial. Later, the City refused to process Zeleny's application claiming that Zeleny does not need a permit to engage in protected First Amendment protests<sup>4</sup> and because "open carry" is unlawful under the new firearms statutes. These assertions were equally pretextual and circular, designed to prevent Zeleny's application from being processed.

159. The City has admitted that unless Zeleny has a permit, he will be arrested for carrying firearms in his protests. It has acknowledged that it knows he is seeking approval so that he can carry firearms in those protests. If Zeleny has a permit, the City acknowledges that he can carry firearms as part of the protest without facing a risk of arrest.

160. Bertini finally admitted at an August 11, 2016 hearing that the reasons for denial of Zeleny's permits include the content of Zeleny's protests. During that hearing, Bertini threatened Zeleny with prosecution under Penal Code § 313(1)(a), obscenity as to minors, due to the content of his proposed presentation, including the use of suggestive cartoon images. Bertini admitted that the alleged "obscenity" of Zeleny's protest was one of the grounds for denial of Zeleny's permits, although this ground has never been documented in the proceedings.

#### **Bertini Intentionally Delays Zeleny's Appeals**

161. Zeleny appealed the initial denial of his permit application in April 2016. The City affirmed the initial denial.

162. Zeleny promptly appealed in May 2016.

163. In June 2016, the City sent Zeleny a letter denying his appeal, reiterating Bertini's pretextual grounds. In this letter the City claimed that "[d]etermination of the approval or denial of any application is at the discretion of the Special Event Permit Committee," although the City did not have such a committee.

164. Zeleny again appealed and requested a hearing before the City Manager. The hearing was eventually set for August 11, 2016. In advance of the hearing, Zeleny's

<sup>4</sup> The City has continued to maintain this frivolous position throughout this lawsuit as well.



1 counsel asked basic procedural questions of the attorney the City had retained to oversee and  
2 conduct the hearing as well as the City Attorney. They refused to respond or explain the  
3 procedures.

4 165. At the hearing, Zeleny presented a valid, California Entertainment Firearm  
5 Permit issued by the California Department of Justice.

6 166. The City nonetheless upheld the decision on appeal in September 2016. It  
7 again asserted the same pretextual grounds and new ones, such as traffic issues and distraction of  
8 passersby. The City admitted at the hearing that it has no objective basis for establishing the  
9 grounds used to deny the permit application.

10 167. Shortly after this denial, Bertini then undertook to have Zeleny's  
11 Entertainment Firearms Permit revoked by the California Department of Justice. When the  
12 Department of Justice would not revoke the permit, the City delayed Zeleny's further appeal  
13 until the permit expired.

14 168. Zeleny timely appealed the denial to the City Council on September 16,  
15 2016. His appeal was originally scheduled for November 15, 2016.

16 169. On October 12, 2016 the City emailed Zeleny notifying him that his  
17 hearing would happen on October 26 – *i.e.*, in two weeks. Zeleny's counsel promptly notified  
18 the City that Zeleny had undergone emergency surgery, and asked to postpone to mid-  
19 November. Rather than simply revert to the original schedule, Bertini and other City staff  
20 decided not to hold a hearing until the next year, 2017.

21 170. Eventually the City unilaterally rescheduled the hearing for April 4, 2017.  
22 When Zeleny asked to advance the hearing due to his wife being due to give birth, the City  
23 refused. It eventually rescheduled the hearing for August 29, 2017.

24 171. In the interim, Bertini repeatedly contacted the California Department of  
25 Justice to seek revocation of Zeleny's firearms permit. In a June 1, 2017 email to the  
26 Department of Justice as part of these efforts, Bertini noted: "We have been postponing  
27 Zeleny's appeal." He urged the Department of Justice to revoke the permit immediately.

172. When the Department of Justice would not do so, the City successfully postponed Zeleny's hearing until August 29, 2017, after his permit expired.

**The City Council Denies the Appeal Without Explanation**

173. The results of the August 29, 2017 appeal hearing were determined in advance. Before the hearing took place, the City had already scheduled a closed-session meeting with counsel to address potential civil litigation by Zeleny.

174. Bertini appeared on behalf of City staff and argued to uphold the denial.

175. In September 2017, the City issued its final decision, simply incorporating the prior pretextual justifications.

**Bertini Intercepts Zeleny's Film Permit Application and Unilaterally Processes that Application as Well**

176. On September 7, 2017, Zeleny requested that the City reconsider the denial of his permit and treat his application as one for a film permit under the separate process the City maintains for film permits. Like his special events permit application, the City did not submit his film application through the ordinary process, did not apply any objective criteria, and simply delayed and refused to process that application.

177. Pursuant to the City's ongoing course of conduct and its conspiracy with NEA, Bertini also intercepted Zeleny's film permit application. Bertini is not involved in the City's film permitting process. Nonetheless, after learning of Zeleny's request, Bertini immediately contacted and met with staff in the City department that processes film permits to ensure a denial of the application. On information and belief, pursuant to this meeting, Bertini dictated the film permit process as well to ensure that Zeleny would not get a permit.

178. On September 27, 2017, after Bertini had met with staff, the City Attorney then emailed Zeleny directing him to submit his film application to this same staff.

179. Once again, the City persistently delayed the application and refused to process it.

180. After a month of delay, City staff demanded extraordinary detail about Zeleny's proposed filming, which it did not need to process the application. They requested far

1 more detailed information than had been requested for other applications. On information and  
2 belief, City staff did this at the direction of Bertini and the City Attorney's office. Three days  
3 later, Zeleny provided the requested details.

4 181. On November 22, 2017, the City Attorney then emailed Zeleny directly,  
5 demanding even more unnecessary, extremely-detailed information about the proposed filming,  
6 including, among other things: exactly where Zeleny planned to place various items as part of  
7 his film, the names of participants and crew, the expected brightness of the display Zeleny  
8 intended to use, the types of guns, serial numbers, who will be supplying them, and other minute  
9 details.

10 182. None of this information is required in the ordinary process. On  
11 information and belief, it was demanded solely to delay the process and use Zeleny's declining  
12 to provide the unnecessary information as a basis to refuse to process his application.

13 183. Once again, the City refused to address any time, place, or manner criteria  
14 or to tell Zeleny the criteria for submitting a satisfactory application. It simply refused to  
15 process his application until he complied with the changing series of information demands.

16 184. The City also delayed the process extensively. Although most permit  
17 applications are processed within days, the City continued to dither and demand unnecessary  
18 details well into December 2017. On information and belief, the City intentionally delayed its  
19 processing of Zeleny's application in order to prevent him from protesting.

20 185. The City has continued to this day to refuse to process Zeleny's permit as  
21 "incomplete." According to the City, Zeleny's permit application still remains "pending" and  
22 cannot be processed.

23 186. Once again, at Bertini's instance, the City has taken Zeleny's film permit  
24 out of the ordinary administrative process and placed it in permanent limbo.

### 25 **DECLARATORY RELIEF**

26 187. An actual, substantial, justiciable, and continuing controversy exists  
27 between Plaintiff and Defendants.  
28

1           188. Plaintiff seeks to exercise his First and Second Amendment rights by  
2 engaging in peaceful protests while carrying unloaded firearms. Due to the statutes, municipal  
3 requirements, and official acts identified herein, Zeleny has been prohibited from exercising  
4 those rights, and the exercise of his First and Second Amendment rights has been chilled due to  
5 the ongoing threat of criminal prosecution.

6           189. A declaration of rights is necessary and proper to clarify Plaintiff's rights  
7 to engage in constitutionally protected activity and to govern the parties' conduct. \

8           190. California Penal Code sections 26350 and 26400, on their face, prohibit  
9 Zeleny from exercising his right to carry firearms in peaceful protest. Zeleny seeks a declaration  
10 that these statutes are unconstitutional on their face, as applied to Zeleny's display of unloaded  
11 firearms as a means of protest.

12           191. California Penal Code sections 25510, 26375, and 26405 allow "authorized  
13 participants" in video productions to carry unloaded firearms in connection with such  
14 productions. On their face, these statutes permit Zeleny to carry unloaded firearms in filmed  
15 protests as part of a video production. The City has taken the position, however, that City  
16 approval is required both of the video production itself and of the "authorized participants"  
17 allowed to carry firearms.

18           192. The City has required the issuance of film permits to Zeleny as a condition  
19 of recognizing his statutory and Constitutional right to lawfully carry unloaded firearms as part  
20 of his videographed public entertainment events protesting ongoing municipal and corporate  
21 sponsorship of an incestuous child rapist. Zeleny contends that he does not need the City's  
22 permission or approval to do so, and that the City has refused its permission and approval as an  
23 unlawful content-based restraint on his right to free speech. A declaration is necessary that the  
24 City's policy requiring such approval is unconstitutional, or that the City cannot condition  
25 approval on the content of the video production or entertainment event.

26           193. The City has prohibited Zeleny from exercising his right to free speech  
27 based on the content of his protests. A declaration is necessary that Zeleny's protests and the  
28 materials used by him in those protests are not obscene as a matter of law, and do not violate

1 California Penal Code section 313.1(a), or in the alternative, that section 313.1(a) is  
2 unconstitutional as applied to Zeleny's protesting activities.

3 **FIRST COUNT**

4 **(Violation of the First Amendment to the United States Constitution)**

5 **(Against Defendants the City of Menlo Park and Bertini)**

6 194. Plaintiff incorporates by reference all allegations in each of the preceding  
7 paragraphs, as if fully set forth herein.

8 195. The First Amendments to the United States Constitution is made applicable  
9 to the City through the Due Process Clause of the Fourteenth Amendment.

10 196. The City of Menlo Park and Bertini have, under threat of criminal  
11 prosecution, prohibited Zeleny from engaging in his lawful protests based on the content of his  
12 speech, claiming that they will prosecute Zeleny for obscenity as to minors.

13 197. Zeleny's protests are not obscene as to minors under established law.

14 198. The City's unwarranted threats to prosecute Zeleny for obscenity as to  
15 minors constitute an unlawful prior restraint and violate Zeleny's rights under the First  
16 Amendment.

17 199. Plaintiff seeks a declaration as follows:

18 a) That Plaintiff's conduct and materials used in his protests are not  
19 "obscene as to minors" under the California Penal Code, or generally "obscene" under  
20 applicable law.

21 b) That Plaintiff's protests are protected First Amendment activity.

22 c) That Defendants' prohibition on Plaintiff's protests violates  
23 Plaintiff's rights under the First Amendment to the United States Constitution.

24 **SECOND COUNT**

25 **(Violation of the First and Fourteenth Amendments to the United States Constitution)**

26 **(Against Defendants the City of Menlo Park and Bertini)**

27 200. Plaintiff incorporates by reference all allegations in each of the preceding  
28 paragraphs, as if fully set forth herein.

1           201. The First Amendments to the United States Constitution is made applicable  
2 to the City through the Due Process Clause of the Fourteenth Amendment.

3           202. The City of Menlo Park has improperly interpreted the exceptions to  
4 California's firearms carry bans, California Penal Code §§ 25510, 26375, and 26405, as  
5 applicable to authorized participants in a motion picture, television or video production, or  
6 entertainment event, to require the City's approval of the production or event itself, and the use  
7 of firearms and "authorized participants" in that production or event.

8           203. The City has applied its misinterpretation of California law to give the City  
9 unfettered discretion to refuse permits for a motion picture, television or video production, or  
10 entertainment event, and participants in said production or event, including based on  
11 impermissible factors, such as the content of the production or event.

12           204. Plaintiff is informed and believes, and on that basis alleges, that the City  
13 has distinguished between commercial motion picture, television or video production, or  
14 entertainment events, and independent political productions, film and video productions of  
15 protests, and film and video productions involving matters of public concern.

16           205. As a result of the City's misinterpretation and misapplication of the  
17 California Penal Code, the City has refused to recognize the exceptions to California's firearms  
18 carry bans, California Penal Code §§ 25510, 26375, and 26405, as applicable to authorized  
19 participants in a motion picture, television or video production, or entertainment event, as  
20 applying to Zeleny.

21           206. Plaintiff seeks a declaration as follows:

22           a) That California Penal Code §§ 25510, 26375, and 26405 do not  
23 require the City's approval of the motion picture, television or video production, or  
24 entertainment event involved, or the use of firearms or the authorized participants in that  
25 production or event.

26           b) That the City's policies and practices regarding permits for motion  
27 picture, television or video production, or entertainment event are unconstitutional as applied to  
28 Zeleny.

**THIRD COUNT**

**(Violation of the First and Second Amendments to the United States Constitution)**

**(Against Defendants the City of Menlo Park and Bertini)**

207. Plaintiff incorporates by reference all allegations in each of the preceding paragraphs, as if fully set forth herein.

208. The First and Second Amendments to the United States Constitution are made applicable to the City through the Due Process Clause of the Fourteenth Amendment.

209. Menlo Park's Special Event Permit and Film Permit policies violate the First and Second Amendments to the United States Constitution, either facially, or as applied to Zeleny's peaceful protests.

210. The City has misinterpreted California Penal Code §§ 25510, 26375, and 26405 as giving the City the right, not only to approve motion picture, television or video productions, or entertainment events within City limits pursuant to customary permitting, but also to approve the individual participants in those productions or events who may lawfully use unloaded firearms. As a result, the City has asserted that it has the ability, on threat of criminal prosecution, to prohibit the lawful use of firearms in video productions as a result of non-compliance with City rules relating to motion picture, television or video production, or entertainment event permits.

211. Pursuant to its unlawful construction of §§ 25510, 26375, and 26405, the City has adopted a municipal policy that gives it unfettered discretion to prohibit protected First Amendment and Second Amendment activity, including on the grounds that the City does not approve of the content or message conveyed by that activity.

212. The City's Special Event Permit and Film Permit policies violate the First and Second Amendments of the United States Constitution on their face in that they allow the City to wholly prohibit the exercise of rights to free speech and to bear arms, or to condition the exercise of those rights on improper factors.

213. Plaintiff is informed and believes, and on that basis alleges, that the City has imposed no definite standards on its Special Event Permit and Film Permit decisions, nor



1 any limitation on the time period within which such permits must be approved, thus arrogating  
2 unbridled discretion on behalf of its permitting officials in violation of the First Amendment.

3           214. The City's Special Event Permit and Film Permit policies are void as  
4 unconstitutionally vague, in that the prohibitive terms are not clearly defined such that a person  
5 or ordinary intelligence can readily identify the applicable standard for inclusion and exclusion.  
6 The requirements impose no restrictions on the discretion of City officials to deny permits  
7 arbitrarily, capriciously, or based on unlawful factors, such as the content of protected speech.

8           215. In the alternative, the City's Special Event Permit and Film Permit policies  
9 violate the First and Second Amendments as applied to Zeleny, because the City has enforced  
10 their provisions to bar Zeleny's peaceful film and video productions and entertainment events,  
11 which comply with California state law, due to the content of his productions and events. This  
12 amounts to an unlawful, content-based prior restraint on Zeleny's protected speech activity.

13           216. The City has also applied its Special Event Permit and Film Permit  
14 requirements in such a way that it amounts to an outright prohibition against Zeleny bearing  
15 arms within City limits.

16           217. Plaintiff seeks a declaration as follows:

17           a) That Penal Code §§ 25510, 26375, and 26405 do not require the  
18 approval by a municipality in order for a person to be an "authorized participant" in a motion  
19 picture, television or video production, or entertainment event, exempted from California's  
20 prohibition on carrying unloaded firearms.

21           b) That the City's Special Event Permit and Film Permit requirements  
22 are unconstitutional under the First and Second Amendments to the United States Constitution  
23 on its face, as improper restrictions of the rights to free speech and to bear arms.

24           c) In the alternative, that the City's Special Event Permit and Film  
25 Permit requirements, as applied to bar Zeleny's peaceful entertainment events and film  
26 productions, amounts to an unlawful prior restraint on Zeleny's First Amendment right to free  
27 speech, and an unlawful restriction on his Second Amendment right to bear arms.

**FOURTH COUNT**

**(Violation of 42 U.S.C. § 1983)**

**(Against Defendants the City of Menlo Park and Bertini)**

218. Plaintiff incorporates by reference all allegations in each of the preceding paragraphs, as if fully set forth herein.

219. The City, through Bertini and other employees and agents, has violated Zeleny's constitutional rights under the First, Second, and Fourteenth Amendments to the United States Constitution, under color of state law, pursuant to official policies, customs, and practices.

220. The City has imposed unlawful prior restraints on Zeleny's protected speech activity by requiring him to unnecessarily seek permits to engage in constitutionally protected activity, and by refusing to grant any such permits based on the content of Zeleny's speech. Forbidding Plaintiff to exercise his right to free speech does not bear any relationship to protecting the public health, safety, or welfare.

221. The City and Bertini have violated Zeleny's rights to engage in protected speech by threatening him with criminal prosecution for engaging in protected activity, including threatening criminal prosecution based on the content of Zeleny's speech and his peaceful use of unloaded firearms as part of that speech.

222. The City and Bertini have violated Zeleny's right to bear arms by threatening him with criminal prosecution for exercising his Second Amendment right to peacefully bear unloaded firearms, in compliance with state law, and through enforcement of unconstitutional laws.

223. Defendants' true purpose was and is to silence the viewpoint expressed by Zeleny's speech and his mode of expression. Consequently, Defendants true purpose was and is to silence disfavored viewpoints in violation of the Free Speech Clause of the First Amendment.

224. As a direct and proximate result of Defendants' violation of the Free Speech Clause of the First Amendment and the Second Amendment, Plaintiff has suffered irreparable harm, including the loss of his constitutional rights, entitling him to declaratory and

1 injunctive relief, and the reasonable costs of this lawsuit, including his reasonable attorneys'  
2 fees.

3 **FIFTH COUNT**

4 **(Violation of the Fourteenth Amendment to the United States Constitution)**

5 **(Against Defendant Becerra)**

6 225. Plaintiff incorporates by reference all allegations in each of the preceding  
7 paragraphs, as if fully set forth herein.

8 226. The government bears the burden of justifying restrictions on the exercise  
9 of fundamental rights by a particular class or classes of individuals.

10 227. All law-abiding, competent adults are similarly situated in that they are  
11 equally entitled to exercise the constitutional right to publicly bear arms in furtherance of their  
12 right to free speech under the United States and California Constitution in connection with a  
13 public issue or an issue of public interest, whether as an authorized participant in an  
14 entertainment event or motion picture, television, or video production, or pursuant to an  
15 entertainment event permit or motion picture, television, or video production permit, or  
16 otherwise.

17 228. Because California's comprehensive firearms carry restrictions bar law-  
18 abiding California residents from publicly carrying a firearm in any manner in furtherance of  
19 their right to free speech under the United States and California Constitution in connection with  
20 a public issue or an issue of public interest, while allowing other law-abiding citizens to carry a  
21 firearm for motion picture, television or video productions, or entertainment events, Defendants  
22 have created a classification of persons, including Plaintiff, who are treated unequally through  
23 the denial of their First and Second Amendment rights to publicly bear arms for expressive  
24 purposes. [Because the 'authorized participant' exception to the ban on publicly carrying a](#)  
25 [firearm lacks sufficient definiteness to notify ordinary persons what conduct is permitted and](#)  
26 [prohibited, and to avoid arbitrary or discriminatory enforcement, it is vague and void under the](#)  
27 [Fourteenth Amendment.](#)

28 229. As the proximate result of the Defendants' procedures and policies,

1 conducted under color of state law, Plaintiff has been deprived of his rights pursuant to the Equal  
 2 Protection Clause of the Fourteenth Amendment to the United States Constitution.

3  
 4 **SIXTH COUNT**

5 **(Conspiracy to Violate Civil Rights under 42 U.S.C. § 1983)**

6 **(Against Defendant NEA)**

7 230. Plaintiff repeats and re-alleges each of the foregoing allegations as though  
 8 fully set forth herein.

9 231. Plaintiff is informed and believes, and thereon alleges, that in or about  
 10 2009, NEA entered into an agreement with the City to discourage, restrict, stifle, and ultimately  
 11 halt Zeleny's exercise of his First Amendment right to protest and his Second Amendment right  
 12 to bear arms. The agreement was to use whatever means were available to defer, disrupt, and  
 13 interfere with Zeleny's protesting activity. These means included intimidating and harassing  
 14 daily surveillance and monitoring, sham litigation, baseless, false and frivolous police reports,  
 15 police harassment and intimidation, fraudulent criminal proceedings, and deprivation of Zeleny's  
 16 access to the administrative permitting process, as alleged above.

17 232. This conspiracy was developed through a series of meetings and other  
 18 communications between representatives of NEA, including its security staff, and  
 19 representatives of the City, including, among others, Sharon Kauffman, and then-Commander  
 20 Bertini.

21 233. During these meetings and communications, the City agreed to use its  
 22 authority under state law to restrict, limit, and ultimately stop Zeleny's protests, and to stop him  
 23 from lawfully carrying unloaded firearms within the City limits. NEA agreed, either tacitly or  
 24 explicitly, to assist the City in its efforts to hamper and end Zeleny's protests and lawful carrying  
 25 of firearms. Internal City documents reflect that as early as 2010, the City was devoted to  
 26 developing a "firm solution" to end Zeleny's protests of NEA altogether.

27 234. NEA, the City, and Bertini engaged in overt acts in furtherance of the  
 28 conspiracy as alleged above.

235. This conspiracy, and the acts of defendants NEA, the City, and Bertini, in furtherance of the conspiracy, injured Zeleny by preventing him from exercising his First and Second Amendment rights as alleged herein, and also violated his Fourteenth Amendment rights, as alleged in more detail above.

### PRAYER FOR RELIEF

WHEREFORE, Plaintiff sues for relief as set forth below:

A. Enter a declaratory judgment, pursuant to 28 U.S.C. § 2201, binding on all Defendants, that California Penal Code §§ 26400 and 26350 are unconstitutional;

B. Enter a declaratory judgment, pursuant to 28 U.S.C. § 2201, binding on all Defendants, that California Penal Code §§ 25510, 26375, and 26405 do not require municipal approval of “authorized participants” in an entertainment event or film or video production, and that Zeleny is legally permitted to carry unloaded firearms in connection with his entertainment events and/or his film or video productions, without the need for City approval, subject to compliance with other applicable laws;

C. Enter a declaratory judgment, pursuant to 28 U.S.C. § 2201, binding on all Defendants, that Zeleny’s peaceful carrying of unloaded firearms in the course of his speech on matters of public concern or matters of political, social, or other concerns to the community or issues of significant importance to the public as a whole, is constitutionally protected; in the alternative, enter a declaratory judgment, pursuant to 28 U.S.C. § 2201, binding on all Defendants, that Zeleny’s peaceful carrying of unloaded firearms in the course of his entertainment events and/or his film or video productions, is constitutionally protected;

D. Enter a declaratory judgment, pursuant to 28 U.S.C. § 2201, binding on the City and Bertini, that Zeleny’s speech activity concerning the child rape cover-up by the Zhush and their associates is constitutionally protected and not obscene or “obscene as to minors” within the meaning of the California Penal Code, and that their public display would not violate Penal Code §§ 311.2, 313.1 (a), and 313.4, in virtue of its serious literary, artistic, political, and social value;

1 E. Enter a declaratory judgment, pursuant to 28 U.S.C. § 2201, that the City  
2 of Menlo Park's Special Event Permit requirement is unconstitutional on its face, or in the  
3 alternative, as applied to Zeleny's protests;

4 F. Enter an injunction against Defendants prohibiting them from enforcing  
5 Penal Code §§ 26400 and 26350 against Zeleny in connection with his peaceful protests, from  
6 enforcing the City of Menlo Park's Special Event Permit requirement, and from refusing to grant  
7 Zeleny required permits based on the content of his speech activity;

8 G. Enter a declaratory judgment, pursuant to 28 U.S.C. § 2201, construing  
9 California Penal Code §§ 25510, 26405, and 26375 and enter a declaratory judgment stating that  
10 these sections exempt from sanctions under California Penal Code §§ 25400, 26400, and 26350  
11 for the carrying of an unloaded handgun and of an unloaded firearm that is not a handgun, any  
12 individual who acts and/or holds himself out as an authorized participant in, or serves as an  
13 authorized employee or agent of a supplier of firearms for, a motion picture, television or video  
14 production, or entertainment event, when the participant lawfully uses that firearm as part of that  
15 production or event, as part of rehearsing or practicing for participation in that production or  
16 event, or while the participant or authorized employee or agent is at that production or event, or  
17 rehearsal or practice for that production or event. Relevant actions and representations include,  
18 without limitation, displaying ornamental signs or multimedia artworks; reciting slogans,  
19 speeches, or poetry; playing trumpets, accordions, bagpipes, or other musical instruments; and/or  
20 wearing conspicuous costumes, makeup, wigs, clown noses, or other decorative prostheses;

21 H. Award nominal damages against Defendant NEA and punitive damages in  
22 an amount to be proven at trial.

23 I. Award attorneys fees pursuant to 42 U.S.C. § 1988 and California Code of  
24 Civil Procedure § 1021.5, and costs as provided by law; and

25 J. Award such other and further relief as the Court deems just and proper.

26 Dated: ~~August 30, 2019~~ September 24, 2020

Respectfully submitted,

27 s/ Damion Robinson

David W. Affeld

Damion D. D. Robinson

Affeld Grivakes LLP

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Attorneys for Plaintiff Michael Zeleny

**DEMAND FOR JURY TRIAL**

Plaintiff demands a jury trial on all matters so triable.

Dated: ~~August 30~~ September 24, 2020, 2019

Respectfully submitted,

s/ Damion Robinson

David W. Affeld

Damion D. D. Robinson

Affeld Grivakes LLP

Attorneys for Plaintiff Michael Zeleny



**PROOF OF SERVICE**

I hereby certify that on September 24, 2020, I electronically filed the foregoing document using the Court's CM/ECF system. I am informed and believe that the CM/ECF system will send a notice of electronic filing to the interested parties.

s/ Gabrielle Bruckner  
Gabrielle Bruckner